No. 94-1316

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

SOUTHVIEW FARM and RICHARD H. POPP,

Petitioners,

vs.

CONCERNED AREA RESIDENTS FOR THE ENVIRONMENT, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Was the Second Circuit justified in upholding the unanimous jury verdict which found that the petitioners violated the Clean Water Act?

2. Was the Second Circuit's characterization of the petitioners' cattle barn complex as a large concentrated animal feeding operation consistent with the applicable statutory and regulatory definitions?

3. Are point source discharges of agricultural pollutants exempted from the Clean Water Act merely because they occur on rainy days?

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This brief is respectfully submitted on behalf of the respondents, Concerned Area Residents for the Environment ("CARE"),[1] in opposition to the petition for writ of certiorari seeking review of the Second Circuit's opinion.

OPINIONS BELOW

This case was brought in the United States District Court for the Western District of New York pursuant to the Clean Water Act of 1977, 33 U.S.C. §§ 1251-1387 ("CWA"). A motion for summary judgment brought on behalf of the petitioners, Southview Farm ("Southview") and Richard H. Popp ("Popp") was denied in April of 1993. *Concerned Area Residents for the Env't v. Southview Farm,* 834 F. Supp. 1410 (W.D.N.Y. 1993). Following a unanimous jury verdict in Respondents' favor on five CWA violations and the state law trespass claim, the district court granted judgment as a matter of law on the five CWA violations but left intact the verdict on the trespass cause of action. (Pet. App. at 23a.) On September 2, 1994, the Second Circuit Court of Appeals, upholding the jury's verdict, unanimously reversed the district court.

STATUTE INVOLVED

The statutory provision at issue in this case is 33 U.S.C. § 1362(14).

STATEMENT OF THE CASE

A. Procedural History

On May 9, 1990, the respondents gave notice of their

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1. The full listing of individual respondents is included in the "parties" section of the petition for certiorari.

intention to sue pursuant to the CWA citizen's suit provision, 33 U.S.C. § 1365. The original complaint was filed on January 22, 1991. The complaint set forth a single cause of action under the CWA and included several state law claims. Before an answer was interposed, Petitioners moved to dismiss for failure to state a cause of action. Prior to a ruling on the motion, an amended complaint was served. The amended complaint became the operative pleading in the lawsuit.

On August 29, 1991, the district court denied Petitioners' motion to dismiss in its entirety. Rejecting the petitioners' argument that the respondents had not alleged a discharge from a point source, the court noted:

> After reviewing the complaint and the relevant case law, I find that plaintiffs have sufficiently alleged a point source discharge to withstand a motion to dismiss. The courts have not interpreted "point source" as narrowly as defendants suggest; indeed, several courts have stressed that the term should be construed broadly.

CARE v. Southview Farm, No. CIV-91-6031L, slip op. at 4 (W.D.N.Y. filed August 29, 1991).

Petitioners moved for summary judgment upon completion of discovery, arguing that no point source discharges could be established to substantiate the CWA claims. Petitioners also argued that several of the discharges identified in the amended complaint were exempt agricultural stormwater discharges. *See generally*, 33 U.S.C. § 1362(14).

On April 7, 1993, the district court denied Petitioners' motion for summary judgment. 834 F. Supp. 1410. Again

endorsing a broad "point source" interpretation, the court ruled as follows:

> In the case at bar, plaintiffs have presented photographs and both lay and expert testimony tending to show that Southview Farm contains both natural and manmade streams and ditches which, if plaintiffs' allegations are true, can and have conveyed pollutants from defendants' manure spreading activity into navigable waters.

834 F. Supp. at 1419. The court rejected the petitioners' argument that certain of the alleged discharges could be considered agricultural stormwater discharges as a matter of law. The court noted:

> Defendants rely in part on their assertion that the pollutants, if any, migrate because of rainwater run-off. However, the fact that some of the alleged discharges may have resulted from rainwater run-off does not necessarily mean that the discharge did not originate from a point source. Notwithstanding that it may result from such natural phenomenon as rainfall and gravity, the surface run-off of contaminated waters, once channeled or collected, constitutes discharge by point source.

834 F. Supp. at 1418.

A supplemental complaint was thereafter served identifying additional point source discharges which had occurred since the filing of the amended complaint. The case was tried before an

eight-person jury from April 26, 1993 to May 17, 1993. Following the district court's charge to the jury, the written instructions were furnished to the jury to consult during deliberations.

The jury deliberated for nearly two days and returned a unanimous verdict in favor of the respondents on five of the eleven Clean Water Act claims submitted for consideration. The jury found in favor of the petitioners on Respondents' nuisance and negligence claims. but returned a verdict in favor of the respondents on the trespass claim, awarding a total of $4,101 in damages. The jury determined that the CWA had been violated by the petitioners on July 12, 1989, July 13, 1989, August 22, 1989, September 26, 1990 and April 15, 1991. The 1989 discharges all occurred at one location within Southview, namely, the Wyant Farm, Field 104 while the 1990 and 1991 discharges occurred on two adjacent fields near the property of one of Southview's neighbors.

The petitioners next moved for judgment as a matter of law. On October 19, 1993, a decision, order and judgment was issued by the district court, setting aside the jury's verdict on the Clean Water Act violations and sustaining the verdict with respect to the trespass claim. (Pet. App. at 23a-57a.) With respect to the CWA violations of July 12, 1989 and August 22, 1989, the district court concluded that insufficient evidence was presented to support the jury's verdict. Regarding the violations of September 26, 1990 and April 15, 1990, the district court found, as a matter of law, that the discharges qualified as agricultural stormwater discharges and, therefore, were exempt from the CWA. The district court held that the discharge occurring on July 13, 1989 was not from a point source as contemplated by the CWA.

Respondents appealed the judgment as a matter of law to the United States Court of Appeals for the Second Circuit. On September 2, 1994, the Second Circuit unanimously reversed the

district court and upheld the jury's verdict on the CWA violations (Pet. App. at 1a.)

With respect to the 1989 violations from Field 104, the Second Circuit rejected the district court's opinion that the liquid manure exiting the field on those days reached navigable waters "in too diffuse a manner to create a point source discharge." (Pet. App. at 8a.) Instead, the Second Circuit concluded that the jury had a reasonable basis to conclude that the improved swale at the edge of Field 104, coupled with the drainage pipe under the stonewall leading into the ditch that leads into the Genesee River tributary was "in and of itself a point source." (Pet. App. at 9a.) Alternatively, the Second Circuit accepted the respondents' argument that the manure spreading vehicles themselves were point sources, and rejected the district court's opinion that "the connection between defendants' activity and the alleged discharge was too far removed to consider the tractors or spreaders as point sources." (Pet. App. at 47a.) The Second Circuit also overturned the district court's holding that the proof of the July 12, 1989 and August 22, 1989 discharges was too circumstantial to support the jury's verdict. (Pet. App. at 12a-13a.)

With respect to the September 26, 1990 and April 15, 1991 violations, the Second Circuit disagreed with the district court's conclusion that the discharges were exempt from the CWA because they constituted agricultural stormwater discharges. According to the Second Circuit, "the real issue is not whether the discharges occurred during rainfall or were mixed with rainwater run-off, but rather, whether the discharges were the result of precipitation." (Pet. App. at 14a.) The Second Circuit concluded that the jury was entitled to find that the discharges on those two dates were caused by over-saturation of the fields with liquid manure rather than the rain, and also that sufficient quantities of liquid manure were present so that the discharges would not qualify as "stormwater." (Pet. App. at 14a-15a.)

The Second Circuit also determined as a matter of law that Southview constitutes a concentrated animal feeding operation ("CAFO") which is, by definition, a point source under the Clean Water Act. 33 U.S.C. § 1362(14). *See also,* 40 C.F.R. § 122.23 (1994). Reviewing the uncontroverted evidence presented at trial relative to the size of Southview's dairy herd and the manner in which the herd is confined, the Second Circuit concluded that Southview is a large CAFO and, as a result, each discharge of manure into the navigable waters of the United States constituted a point source discharge in violation of the CWA. For this additional reason, the Second Circuit sustained the jury's verdict. The district court had denied Respondents' request to charge the jury that Southview was a CAFO.

B. Factual Background

Petitioner Southview Farm is one of the largest dairy farms in the State of New York. The farm employs 28 full-time and nine part-time employees. As of August, 1992, Southview owned 1,100 acres of land and had a cattle population of 1,290 milking cows with over 900 head of young cattle, for a total of 2,200 dairy animals.

Southview's cows are not pastured; they remain in the barns and are moved only for milking three times per day. The milking parlor is washed down and the milking machines are flushed after every milking with a chlorine cleanser and rinsed with a phosphoric acid solution. The resulting washwater is then pumped into a 2,000-gallon storage tank. The solution in the tank is subsequently used to wash the milkhouse floor. In the last step, the waste wash solution flows down an incline into one of five manure storage lagoons located on the farm.

The largest of Southview's manure storage lagoons covers four acres and has a capacity of approximately six to eight million

gallons of liquid cow manure and process wastes. In conjunction with the large lagoon, Southview installed a separator which pumps the cow manure over a mechanical device that drains off the liquid and passes the solids out through a compressing process. The solids that remain are dropped into bins for transport while the liquid is transported by gravity to the large manure storage lagoon.

Southview uses various technologies to apply the liquid cow manure (which includes the farm's chemical process waste) to its fields. One of the devices is a center pivot irrigation system. The center pivot irrigator is connected by a series of pipes to the liquid manure storage lagoon and is self-propelled. Southview also uses a "hard hose traveler," essentially, a long piece of plastic tubing on a large reel. The tubing is unwound from the reel and has a gun on the end which can propel liquid manure 150 feet into any direction, making a 300-foot wide swath for purposes of depositing the wastes on the fields.

Since 1988, Southview has had in place a piping system. The system pipes liquid manure from the storage lagoon to various locations across the Southview property without the use of vehicles. Southview's piping system extends underneath both state and town highways to nearby properties owned by the petitioners.

In addition to the above, Southview also uses manure spreading equipment, including spreaders pulled by tractors and other self-propelled vehicles. The vehicles are generally used to spread manure from the smaller lagoons which did not receive liquid manure from the separation system. In all, Southview's manure spreading records reflect the application of millions of gallons of manure to its fields.

REASONS FOR DENYING THE WRIT

The petitioners have failed to satisfy criteria traditionally applied by the Court in determining whether to grant a writ of certiorari. The Second Circuit, in a manner consistent with other circuit courts, correctly interpreted and applied the applicable provisions of the Clean Water Act and the corresponding regulations. In an attempt to obtain review here, the petitioners have mischaracterized the holding of the court below and, with little or no foundation, have exaggerated the impact the decision will have on agricultural enterprises.

I.

THE SECOND CIRCUIT WAS JUSTIFIED IN UPHOLDING THE UNANIMOUS JURY VERDICT WHICH FOUND THAT THE PETITIONERS VIOLATED THE CLEAN WATER ACT.

The central question in this case is whether each of the discharges of liquid manure into the navigable waters of the United States — established to the jury's satisfaction — came from a "point source." "Point source" is defined in the CWA as:

> Any discernible, confined and discrete conveyance, including, but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, rolling stock, concentrated animal feeding operation, vessel or other floating craft, or landfill leachate collection system from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

33 U.S.C. § 1362(14). This definition was incorporated in the jury instructions read at the conclusion of the case and furnished to the jurors to consult during their deliberations. Petitioners' zeal to portray the Second Circuit's decision as renegade judicial lawmaking has led them to repeatedly sidestep the fact that the Second Circuit simply upheld the unanimous verdict of an eight-person jury. If consideration of Southview's petition starts, as it should, with the premise that the jury, after weighing the evidence, concluded that the discharges in question were from point sources, then the petitioners' argument loses its vitality.[2] So long as proper deference is paid to the jury's verdict, the petitioners' argument that the Second Circuit ignored the pertinent law lacks merit.

The flaw in the petitioners' analysis is that they proceed on the assumption that agricultural discharges and point source discharges are mutually exclusive terms. They are not. While it may be true that most agricultural discharges are nonpoint source in nature, there is nothing in the Clean Water Act nor any of the regulations promulgated thereunder which supports the general proposition that all agricultural discharges are nonpoint source in nature. Petitioners have cited no authority for such a proposition. Furthermore, a careful reading of the Clean Water Act militates against such an interpretation. While Congress intended to exempt nonpoint pollution, there is no general exemption for agricultural activities in the Clean Water Act. Thus, "EPA has been held to be precluded from exempting from the act . . . agricultural and silvicultural activities." *Sierra Club v. Alston Constr. Co., Inc.*, 620 F.2d 41, 44 (5th Cir. 1980), *citing Natural*

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2. Petitioners appear to have overlooked this point when they complain that the Second Circuit, in reinstating the jury verdict, "impermissibly substituted its own unsubstantiated factfinding for the findings of the district court . . ." (Pet. at n.7.) Of course, it was the district court which impermissibly substituted its judgment for that of the jury. *See Smith v. Lighting Bolt Prods., Inc.*, 861 F.2d 363, 367 (2nd Cir. 1988).

Resource Defense Council ("NRDC") v. Costle, 568 F.2d 1369, 1377 (D.C. Cir. 1977).

In *NRDC v. Costle,* the D.C. Circuit set aside EPA's attempt to grant an across-the-board exemption for all "discharges of pollutants from agricultural and silvicultural activities ... including run-off from cultivated crops, [and] pastures" from the requirement for NPDES permits. 568 F.2d at 1372 n.5. The courts have been unable to discern any intention on the part of Congress to provide a blanket exemption for agricultural activities. Furthermore, there is nothing in the 1987 Clean Water Act amendments which suggests that Congress sought, at that time, to provide such a blanket amendment. As noted below, the only effect of the 1987 amendment was to add a specific exemption for "agricultural stormwater discharges" to the exemption which was added earlier for "return flows for irrigated agriculture." 33 U.S.C. § 1362(14), *as amended by* Pub. L. No. 100-4, tit. V, § 502(a.) The fact that Congress has elected on those two separate occasions to incorporate specific agricultural exemptions in the CWA definition of the term "point source," suggests that agricultural discharges which come under the general definition but do not qualify for either exemption constitute point source discharges within the reach of the CWA.

In the absence of any express exemption for agricultural discharges, the jury was entitled to evaluate whether or not the discharges at issue constituted point source discharges as defined in the CWA. In upholding the jury's conclusion that these discharges were from a point source, the Second Circuit recognized that the definition of a point source is to be broadly interpreted. *Dague v. City of Burlington,* 935 F.2d 1343, 1354 (2d Cir. 1991), *rev'd on other grounds,* 505 U.S. ___, 112 S. Ct. 2638, 120 L. Ed. 2d 449 (1992); *see also, Sierra Club v. Abston Constr. Co.,* 620 F.2d 41, 45-46; *United States v. Earth Science, Inc.,* 599 F.2d 368, 378 (10th Cir. 1979) ("The concept of a point source

was designed to further this [regulatory] scheme by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States.")

In light of the uniformly broad interpretation given the definition of point source in the CWA, the Second Circuit did no violence to the statutory scheme when it concluded that the drainage ditch at the edge of Field 104 constituted a point source. The petitioners' description of the swale at the edge of Field 104 as a mere "depression" is misleading since it ignores the fact that the drainage at this location had been improved with the placement of a drainage tile pipe emptying into a drainage ditch which, itself, empties into a tributary of the Genesee River. Since the term "ditch" is included in the CWA definition of point source, the petitioners should not be heard to claim that such a conveyance was not within the contemplation of Congress.

The petitioners would have the Court limit point source discharges to classic "end-of-the-pipe" discharges. The cases demonstrate, however, that the term "point source" has been given much broader sweep. For example, in *Dague v. City of Burlington,* 935 F.2d 1343, the emission of pollutants leaching from a landfill into a railroad culvert was properly considered a "point source." In *Fishel v. Westinghouse Elec. Corp.,* 640 F. Supp. 442 (N.D. Pa. 1986), overflow from a lagoon through an unchannelized area into a stream was considered a point source. Furthermore, in *United States v. Oxford Royal Mushroom Prods.,* 487 F. Supp. 852 (E.D. Pa. 1980), the court found that an indictment, which alleged that a spray irrigation system was a point source, was legally sufficient:

> Oxford has a spray irrigation system, designed to spray wastewater onto fields in quantities small enough to be absorbed by

> those fields; none of the discharge should run-off into the surface water. The discharges forming the basis of the indictment resulted from spraying an overabundance of wastewater onto the surface of the irrigation fields, which in turn ran-off into a nearby stream through a break in the berm around those fields.

487 F. Supp. at 844. Similarly, there is no requirement that the point source discharge directly into navigable waters in order to violate the CWA. In *United States v. Velsicol Chem. Corp.*, 438 F. Supp. 945 (W.D. Tenn. 1976), discharges to the city sewers which eventually emptied into the Mississippi River were considered a point source. In *O'Leary v. Moyer's Landfill, Inc.*, 523 F. Supp. 642 (E.D. Pa. 1980), a landfill which discharged through such methods as "gullies, trenches and ditches" was found to be a "point source," even though it was not directly connected to the waters of the United States. Likewise, in *Friends of Sakonnet v. Dutra*, 738 F. Supp. 623 (D.R.I. 1991), the point source included the defendants' septic system, which leached through a pipe installed by the municipality.

Finally, there is no requirement that the conveyance which qualifies as the point source be man-made. In *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, the Fifth Circuit held: "nothing in the Act relieves miners from liability simply because the operators did not actually construct those conveyances, so long as they are reasonably likely to be the means by which pollutants are ultimately deposited into a navigable body of water." 620 F.2d at 45. There is nothing in the Clean Water Act definition of point source that exempts natural conveyances.

The Second Circuit was also acting in harmony with existing precedent when it decided that the manure spreading vehicles

themselves constitute point sources. Section 1362(14) defines a "point source" to include a "container" or "rolling stock" and the cases have routinely found vehicles to be within the definition of point source. 33 U.S.C. § 1362(14). *See, e.g., United States v. Tull*, 615 F. Supp. 610, 622 (D.C. Va. 1983), *aff'd*, 769 F.2d 182, *rev'd on other grounds*, 481 U.S. 412, 107 S. Ct. 1831, 95 L. Ed. 2d 365 (1987); *United States v. Weisman*, 489 F. Supp. 1331, 1337 (N.D. Fla. 1980); *Avoyelles Sportsmen's League v. Alexander*, 473 F. Supp. 525, 532 (W.D. La. 1979), *aff'd in relevant part*, 715 F.2d 897 (5th Cir. 1983); *United States v. Holland*, 373 F. Supp. 665, 668 (N.D. Fla. 1974). As noted above, the fact that the manure spreading vehicles did not discharge directly into navigable waters is irrelevant.[3] Accordingly, the Second Circuit's decision to uphold the jury verdict is entirely consistent with existing precedent and does not frustrate the congressional intent behind the Clean Water Act. Agricultural point source discharges can and do occur, and are increasing as farms like Southview grow in size and intensity. (*See* Point IV, *infra.*)[4]

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3. The petitioners, like the district court, appear to concede that the manure spreading vehicles *could be* point sources so long as the connection between the manure application and the discharge into the navigable waters was sufficiently direct. Once again, since indirect point source discharges violate the CWA, the temporal element cannot be the dispositive factor. In any event, this point, at best, raises a fact question which the jury resolved against Southview.

4. Not surprisingly, the petitioners make no mention of the incident which occurred during July of 1992 when one of Southview's liquid manure pipelines ruptured and discharged thousands of gallons of manure into nearby ponds, wetlands and a stream which eventually led to the Genesee River in Letchworth State Park. Extensive fish kills from nearby ponds were reported and discolored water and mounds of manure-laden foam were visible for weeks from various scenic overlooks in the state park. Contrary to the description contained in the petition (Pet. at 12), Southview is far from a conventional farm.

II.

SOUTHVIEW FARM CONSTITUTES A CONCENTRATED ANIMAL FEEDING OPERATION.

Although Southview's general position that most agricultural pollution is nonpoint source in origin is accepted, there is no avoiding the reciprocal truth: some agricultural pollution is from point sources. CAFOs are one such point source, a source deemed so important by Congress that they were enumerated as a point source class within the CWA. 33 U.S.C. § 1362(14) ("point source" includes "any discernible, confined and discrete conveyance, including but not limited to any . . . concentrated animal feeding operation"). When the CAFO definition is evaluated, it is apparent that Southview is indeed within the class.

Animal feeding operation ("AFO") is defined by regulation as "a lot or facility" where animals "have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period," and "[c]rops, vegetative forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility." 40 C.F.R. § 122.23(b)(1) (1993). A dairy farm AFO becomes a regulated large CAFO when it houses more than 700 mature dairy cattle. *Id.*, app. B (a)(1) (1993). There is a zero-discharge standard for large CAFOs. 40 C.F.R. § 122.23, app. B (a)(1); 58 Fed. Reg. 7632 (1993).

Southview's strained argument that it is not a CAFO because it has adjacent lands[5] which bear vegetation during portions of the

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5. The reference in Southview's petition to *Farmegg Prods., Inc. v. Humboldt County,* 190 N.W. 2d 454 (Iowa 1971), defining appropriate characteristics of "industrial" agricultural operations begs the question before the Court. Congress and the EPA have defined "industrial" agricultural (Cont'd)

growing year is nonsensical.[6] If the petitioners' argument to this Court is accepted, the presence of *any* vegetated areas adjacent to a large CAFO would lift it from the regulated industrial cattle arena. Clearly, Congress' intent was not to exclude concentrated animal feeding operations from regulation simply because they exist in a rural setting and the operators happen to own and use vegetated, adjacent lands. The presence and use of adjacent fields have not prevented other federal circuits from finding a facility to be a CAFO. *See Carr v. Alta Verde Indus., Inc.*, 931 F.2d 1055 (5th Cir. 1991) (Facility was CAFO despite use of waste manure on adjacent crop fields for irrigation and fertilization; and as noted in an earlier opinion in the same case: "the fields produce alfalfa, rye and other grains for cattle feed." 924 F.2d 558, 559); *Higbee v. Starr,* 598 F. Supp. 323 (E.D. Ark. 1984), *aff'd without op.*, 782 F.2d 1048 (8th Cir. 1985) (hog houses were a CAFO although collected wastes were spread on adjacent fields). The Second

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operations as CAFOs. Simply because Southview views its high-tech waste-handling operations and its 2,000-head herd of cattle in a pastoral light does not mean that it should be exempt from the CAFO classification drafted by Congress, defined by the EPA, and accepted by Congress for nearly 20 years. In fact, Petitioner distorts the true state of affairs by claiming that "few dairy farms today rely on pasturage to feed their mature lifestock." (Pet. at 22.) According to the 1987 Census of Agriculture, only 780 dairy farms nationally qualify as large CAFOs.

6. Note that confined in pasture operations (CIPOs) are distinguished from CAFOs by the EPA. The definition of CAFOs explicitly excludes operations which confine animals in an outdoor, vegetated environment, and distinguishes large CIPOs from large CAFOs, since CAFOs undoubtedly have more severe waste management difficulties. *See generally,* 58 Fed. Reg. 7616 (1993) (exempting CIPOs from CAFO permitting requirements). Petitioners distort the holding of the Second Circuit by claiming it requires a dairy farm to grow crops inside its barns to avoid being classified as a CAFO. (Pet. at 13.) On the contrary, if a dairy farm pastures its cows as farmers have done through the ages, it will not qualify as a CAFO.

Circuit's ruling on the CAFO issue is supported by statutory and regulatory construction and was advanced by the EPA in its *amicus* brief.

The fact that Southview grows crops on adjacent fields is of no legal significance, since the animals were not pastured on those fields. Any other interpretation of the regulation would be contrary to the intent of Congress and the EPA since most CAFOs do grow some crops. "EPA presumes that most, if not all, feedlots have some vegetation nearby." U.S. Envtl. Prot. Agency, *Perceptions About EPA's Actions in the Southview Farm Case* 1 (Dec. 12, 1994).

The regulatory history of the "vegetation criterion" is telling. When originally proposed, the AFO definition encompassed a "a lot or facility" in which "crops, vegetation or forage growth are not sustained in the area of confinement." 40 C.F.R. § 125.51(a)(1) (proposed), 40 Fed. Reg. 54185 (1975). However, in responding to subsequent comments questioning whether growth of vegetation in only part of the confined area disqualified a facility from being an AFO, the regulation was changed to make a "clarification" stating "that only confined areas which lack vegetation, crops, etc. in every part or portion of the lot or facility are included." 41 Fed. Reg. 11458 (1976).

While the new version did substitute "lot or facility" for "confined area" in the vegetation criterion, that was due to the fact that EPA used the term "confined area" interchangeably with "lot or facility." The agency never indicated any intent to change the locus of inquiry from the confined area to all of the feedlot owner's property. Thus, the phrase "lot or facility," found in both 40 C.F.R. §§ 122.23(b)(1) and 122.23(b)(1)(ii) (1993), refers to the same location — the area where the animals are "confined," 40 C.F.R. § 122.23(b)(1)(i), and not some larger area.

The presence of adjacent fields does nothing to mitigate the monumental animal waste production going on within the confined animal area itself. As the Second Circuit noted, there is a two-fold rationale for the exemption in the CAFO definition for vegetated confinement facilities: (1) the fact that vegetation can be sustained in the area in which the animals are confined suggests a lower density of animals; and (2) the vegetation helps to absorb and reduce the amount of pollution. (Pet. App. at 19a.) CAFO permitting requirements reflect this reality. 58 Fed. Reg. 7631 (dealing with wastewater removal and land application relative to CAFOs).

Land disposal of waste like that engaged in by Southview has been addressed by the EPA. The EPA established a general CAFO permit for its Region 6 (Louisiana, New Mexico, Oklahoma and Texas). Under this general CAFO permit, waste handling, treatment, and management must not create environmental or public health hazard of any kind. Specifically, the wastes must be disposed of in a manner such as to prevent them from being discharged to waters of the United States. 58 Fed. Reg. 7627, 7629. Discharge of waste from the application site is prohibited.[7] 58 Fed. Reg. 7632. Thus, EPA has already addressed operations like Southview's without crippling agriculture, as Petitioners have warned.

Once it has been established that a dairy operation constitutes a large CAFO, the only issue which remains is whether there has been a discharge into navigable waters. Since even the petitioners cannot dispute that there were discharges into navigable waters on the five dates in question, the CAFO requirements have been satisfied.

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7. Note that, under this permit, large CAFOs may apply animal wastes to fields in amounts exceeding nutrient uptakes only if the sites are isolated from surface waters and no potential exists for run-off to reach a water of the United States. 58 Fed. Reg. 7632. There was no judicial challenge to EPA's Region 6 permit.

III.

A DISCHARGE IS NO LESS A POINT SOURCE DISCHARGE BECAUSE IT OCCURS ON A RAINY DAY.

Petitioners' basic proposition with regard to the "agricultural stormwater discharge" exception is that as long as it rains, an agricultural enterprise can pollute the nation's waters at will. In contrast, the Second Circuit reasoned that "the real issue is not whether the discharges occurred during rainfall or were mixed with rainwater run-off, but rather, whether the discharges were the result of precipitation." (Pet. App. at 14a.) Thus, "while the statute does include an exception for 'agricultural stormwater discharged,' there can be no escape from liability for agricultural pollution simply because it occurs on rainy days." (Pet. App. at 13a.)

The Second Circuit's holding is consistent with the district court's charge to the jury. The charge stated that the exemption pertains to discharges caused "primarily" by "ordinary, natural" runoff of precipitation:

> Point source does not include agricultural storm water discharges. Storm water means storm water run-off or snow melt run-off or surface water run-off and draining. The ordinary, natural run-off of rain water, that is the flow of excess precipitation, is not a point source. . . . Disparate, random, naturally induced run-off of pollutants, whatever kind, caused *primarily* by rainfall or other natural precipitation around activities that employ or cause pollutants is not a point source discharge . . .

(Tr., vol. v, at 2118-2119.) Thus, Petitioners' attack not only second-guesses the jury's evaluation of the credibility of the evidence presented, but also challenges both lower courts' interpretation of the applicable law.[8]

The Second Circuit's interpretation is consistent with the relevant legislative and regulatory history. The exemption was added by the Water Quality Act of 1987, Pub. L. No. 100-4, § 503, at the same time that "Congress mandated comprehensive regulation of certain forms of industrial and municipal stormwater run-off under Clean Water Act § 402(p), 33 U.S.C. § 1342(p). (Pet. App. at 13a.) Given the enactment of the new stormwater permit program, however, Congress (especially members from agricultural states) wanted to avoid any possibility of bringing run-off caused by stormwater from farms under the new program. Therefore, as the Second Circuit noted: "one can infer that Congress wanted to make it clear that agriculture was not included in this new program." (Pet. App. at 13a.)

It is evident that Congress intended to preserve the status quo, which had existed during the fifteen years between enactment of the Clean Water Act in 1972 and enactment of the exception, pursuant to which "agricultural stormwater runoff was always considered nonpoint pollution exempt from the Act." (Pet. App. at 13a.) *See, e.g.*, 40 C.F.R. § 125.4(h) (1973) (exception for run-off from cultivated crops).

Early on, EPA recognized that the test for determining if a

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8. When setting aide the jury verdict, Judge Larimer found it necessary to rule that the manure "would have remained on [petitioners'] land had it not been for a heavy rain." (Pet. App. at 352.). Thus, he adhered to his prior ruling that the primary *cause* of the discharge was the relevant area of inquiry. The problem was that he substituted his own findings of fact for the reasonable findings of the jury.

stormwater discharge occurred is whether the discharge was "caused or initiated solely by natural processes such as precipitation," so that "[t]he intent of the regulations is to exclude from the NPDES permit program all natural runoff from agricultural land which results from precipitation events." 41 Fed. Reg. 7963, 7964 (1976).

Although EPA regulations do not define "agricultural stormwater discharge," regulations promulgated on November 16, 1990 to implement the 1987 industrial/municipal stormwater regulatory program defined the general term "storm water" as "storm water runoff, snow melt runoff, and surface runoff and drainage." 40 C.F.R. § 122.26(b) (13) (1994). No reported judicial decision could be found interpreting the meaning of "agricultural stormwater," yet the New York State Department of Environmental Conservation has ruled that in order for the identical exception under New York Environmental Conservation Law section 17-0105(6) to apply, "the waste water being discharged must result from precipitation which runs off the crop field." *In re N. Adirondack Farms, Inc.*, DEC Decl. Rul. 17-07 at 6 (1992).

Thus, for the discharges in question, the issue was not whether they occurred during rainfall, or whether the discharge was mixed with rainwater run-off,[9] but whether the discharge was

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9. Petitioners make much of the Second Circuit's statement, with regard to the September 26, 1990 discharge, that the jury could have properly found that "sufficient quantities of manure were present so that the run-off could not be classified as 'stormwater.' " (Pet. App. at 15a.) The reference to "sufficient quantities" is taken out of context, and was merely an acceptance of Respondents' alternative argument that *even if* the discharge was caused by precipitation, it would not qualify for the exemption if it is so polluted that it cannot be considered "stormwater." *See, e.g., RAIL v. Diversified Systems*, 804 F. Supp. 1036, 1039 (E.D. Tenn. 1992) (run-off contaminated by leachate was not stormwater); *Dague v. City of Burlington*, 935 F.2d 1343 (2d Cir. 1991), (Cont'd)

the *result* of precipitation. Otherwise, farmers would be free to dispose of excess waste in conjunction with meteorological forecasts of precipitation, and the months of March and April would be open season for discharges due to snow melt run-off. Petitioners' position would lead to the absurd result that a farmer could dispose of his waste by mixing it with a few drops of rainwater. While there is a line to be drawn somewhere, it was up to the jury and not the trial judge to draw it. As the Second Circuit recognized, "all discharges eventually mix the precipitation run-off in ditches or streams or the navigable water so the fact that the discharge might have mixed with runoff cannot be determinative." (Pet. App. at 14a.)

Accordingly, since the jury had a reasonable basis to find that the discharges on September 26, 1990 and April 15, 1991 "were not the result of rain, but simply occurred on days when it rained," the Second Circuit properly upheld their verdict. (Pet. App. at 14a.)

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rev'd on other grounds, 505 U.S. ___, 112 S. Ct. 2638, 120 L. Ed. 2d 449 (1992) (leachate generated by percolation of precipitation required NPDES permit). Nonetheless, the Second Circuit also accepted the respondents' main contentions that "the jury could properly find that the run-off was primarily caused by the over-saturation of fields," and "could have found a discharge unaffected by rain." (Pet. App. at 15a.) Therefore, the question of "sufficient quantities" is in no way a necessary component of the decision. Also note that, because the discharges included "process waste water" (including waste chemicals), 40 C.F.R. § 412.11-412.13 (1994), it was not stormwater.

IV.

THE DECISION OF THE SECOND CIRCUIT IS CONSISTENT WITH SOUND PUBLIC POLICY.

As noted above, the Second Circuit decision conforms to existing precedent and represents a reasoned application of current agricultural policy as expressed in the Clean Water Act and its accompanying regulations. It is inconsistent with sound public policy to place intensive, technologically-oriented dairy farms like Southview with their potential for massive discharges of manure beyond the purview of the Clean Water Act.

"American agriculture is changing rapidly — becoming more concentrated, more technically advanced and more integrated with the input and marketing sectors. "In other words, American agriculture is rapidly becoming industrialized." Neil D. Hamilton, *Feeding Our Future: Six Philosophical Issues Shaping Agricultural Law,* 72 Neb. L. Rev. 210, 213 (1993). Accordingly, agriculture, like any other industry, should be required to internalize its fair share of the cost of cleaner water. George A. Gould, *Agriculture, Non-Point Source Pollution and Federal Law,* 23 U.S.C. at Davis L. Rev., 461, 488 (1990). It is both unrealistic and unfair for the petitioners to expect that the public should bear the costs of water quality impairment caused by their own improper manure management practices. Instead, it is appropriate to require that the petitioners and their counterparts in the agricultural community ameliorate the environmental impacts of their increasingly industrialized operations.

Recent studies indicate that agriculture is, far and away, the leading source of water quality impairment of this country's lakes and rivers. Office of Water, U.S. Envtl. Prot. Agency, *Nat'l Water Quality Inventory: 1992 Rep. to Congress* 9-13 (1994). Virtually every region of the country has experienced water quality

problems resulting from livestock waste. Larry C. Frarey and Staci J. Pratt, *Environmental Regulation of Livestock Production Operations,* Nat. Resources and Env't (A.B.A. Nat. Resources, Energy and Envtl. L. Sec.), Winter 1995, at 8. Even the agronomist used at trial as an expert witness on behalf of the petitioners has written that careless manure management practices pose serious environmental hazards:

> Excessive rates of manure will over-supply nutrients that may affect plant growth and animal nutrition. Excessive rates of application as well as accumulations of manure around barn lots will eventually cause water pollution. Preventing such problems calls for a combination of appropriate soil and water conservation practices and proper management of the rate, timing and method of manure application. In extreme cases, additional land must be used to lower the application rate.

Stuart D. Klausner, *Managing the Land Application and Animal Manures: Agronomic Considerations,* Dairy Manure Mgmt. (Ne. Regional Agric. Engineering Serv., Syracuse, N.Y.), Feb. 22-24, 1989 at 79, 86. The Second Circuit's decision is simply a reflection of a statutory and regulatory framework designed to address, in part, the serious and widespread environmental risks posed by large industrialized dairy farming and other livestock enterprises. In essence, Southview Farm is more like an industrial enterprise than an old-fashioned family farm. The Court, therefore, should view with a jaundiced eye Petitioners' attempts to invoke protections more properly aimed at traditional agriculture. *See,* Neil D. Hamilton, *Feeding Our Future: Six Philosophical Issues Shaping Agricultural Law,* 72 Neb. L. Rev. at 215-216. *See, generally,* William P. Browne, *et al., Sacred*

Cows and Hot Potatoes: Agrarian Myths in Agricultural Policy (1992).

Ultimately, if the petitioners seek to overrule the Second Circuit's determination in this case, Congress is the proper forum. Currently, Congress is considering a CWA rewrite bill which, among other things, would modify the definition of point source in the CWA to exclude all land applications of manure. H.R. 961, 104th Congress, 1st Sess. (1995); *see,* 25 Env't Rep. (BNA) 2124 (March 3, 1995). If the prevailing policy, as embodied in the CWA, is to be revised, Petitioners should direct their efforts at Congress, not this Court.

CONCLUSION

For the reasons set forth above, the respondents respectfully request that the Court deny the petition for Writ of Certiorari.

Respectfully submitted,

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